91-1263

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS. INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1529, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a bargaining order of the National Labor Relations Board be unconditionally enforced without regard to employee sentiment in cases of gross Board-occasioned delay?

2. Does Section 10(b) of the National Labor Relations Act — the six-month statute of limitations governing the General Counsel's issuance of unfair labor practice complaints — prohibit an employer from withdrawing recognition of a union based on evidence of facts occurring more than six months earlier?

3. Where a supervisor who is a bargaining unit member has lawfully participated in circulating a decertification petition among fellow bargaining unit members, does the employer's statements to the bargaining unit members subsequent to the filing of the petition with the Board "ratify" the member-supervisor's prior statements so as to "taint" the petition and prevent a decertification election?

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LIST OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The decision of the National Labor Relations Board in this case is reported at 294 NLRB No. 6 and at 138 LRRM 2160. The decision of the Court of Appeals is an unpublished decision listed at 943 F.2d 52 (Table) and at 138 LRRM 2160 (Table). The order of the Sixth Circuit denying rehearing has not been reported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on August 23, 1991, and the order of the Court of Appeals denying rehearing was entered on November 1, 1991. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

Involved in this case are the following statutory provisions found in Sections 8(a)(5) and 10(b) of the National Labor Relations Act:

> It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.

29 U.S.C. §158(a)(5).

> [N]o complaint shall issue based upon any unfair labor practices occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed

> forces, in which event the six-month period shall be computed from the day of his discharge.

29 U.S.C. §160(b).

STATEMENT OF THE CASE

Each of the Petitioners independently operates one or more retail grocery stores in the Memphis, Tennessee area. Prior to February of 1982, Petitioners' meat department employees were represented by Local 452 of the United Food and Commercial Workers Union which had been Meatcutters District Union 452. In February of 1982 a merger election was held, allegedly resulting in the merger of Local 452 into the much larger Local 1529 of the United Food and Commercial Workers Union. Petitioners received notice of this alleged merger in a letter from the union dated April 7, 1982. Initially, Petitioners had no reason to question the validity of the merger election and therefore continued to abide by the existing collective bargaining agreement with Local 452.

Sometime later that summer, bargaining unit employees of Petitioner Baker Bros. began circulating a decertification petition. Amongst the supporters of decertification were members of a bargaining unit who held head meatcutter positions. These individuals encouraged their fellow bargaining unit members to sign the petition.[2] The

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[2] The Board determined that the head meatcutters were statutory supervisors, but did not find that their support of the decertification petition had been unlawful at the time their actions were taken under the doctrine of *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956) (when a supervisor is a member of the union, then the employer is not responsible for his or her encouragement of an anti-union petition unless the employer encouraged, authorized, or ratified the supervisor's acts or statements).

decertification petition was filed with the Board on August 9, 1982. Subsequent to that date, a management representative of Baker Bros. met with the meat department employees and told them he had been notified by the Board that a petition for a decertification election had been filed, that it was his understanding that the majority of employees had signed the petition, and that he appreciated their confidence.[3]

In the fall of 1982, Petitioners learned of facts concerning the merger election between Locals 452 and 1529 which indicated the merger was defective and invalid because, among other things, due process safeguards for the protection of employee free choice had been disregarded.[4] Each of the Petitioners then withdrew recognition from Local 1529, stating that in each Petitioner's view the union did not represent the employees whom Local 452 had previously represented.

Following their withdrawal of recognition, unfair labor practice charges were filed against Petitioners. A hearing before an administrative law judge (ALJ) was completed on April 11, 1983, and the ALJ's decision rendered on May 4, 1984. Exceptions were promptly filed with the Board. However, the Board failed to issue its decision and order for over five years. On May 31, 1989 — nearly seven

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[3] The Board held that these statements — perfectly lawful on their face — constituted a "ratification" of the head meatcutters' prior alleged statements in support of the decertification, thereby tainting the petition and precluding a decertification election.

[4] Evidence concerning the invalidity of the merger was presented to the Board, but the Board never considered this evidence or the issue of whether the merger election was invalid, instead holding that Section 10(b) of the Act precluded consideration of that evidence because more than six months had passed since the merger.

years after the events leading to Petitioners' withdrawal of recognition from the union — the Board rendered a decision ordering Petitioners to bargain with Local 1529.[5]

The Board found that each of the Petitioners violated Section 8(a)(5) of the Act when it withdrew recognition from the union. As previously noted, the Board concluded that evidence that the merger election was defective could not be considered because the merger occurred more than six months prior to each Petitioner's withdrawal of recognition. The Board reasoned that consideration of the validity of the merger was barred by Section 10(b) of the Act, and that even if the merger was defective and invalid, Petitioners were thus time-barred from using that fact as a basis for withdrawing recognition.

Additionally, the Board held that the decertification petition filed by employees of Baker Bros. was tainted. This ruling was premised on the Board's conclusion that the statements of a manager, *after the decertification petition had been filed* with the Board, "ratified" the head meatcutters' earlier actions in support of decertification and *retroactively* "tainted" the petition.

BASIS OF FEDERAL JURISDICTION BELOW

The Board assumed jurisdiction of this matter upon a finding that Petitioners are employers engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and that Local 1529 is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. §§152(5)-(7). The Court of Appeals had jurisdiction pursuant to Section

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[5] The Board gave no consideration to the question of whether the employees now desire to have a union represent them when there has been no contact with that union for all these years.

10(f) of the Act, 29 U.S.C. §160(f) upon petition for review of the Board's order and on cross-application of the Board for enforcement of its order.

ARGUMENT

A. ***A writ should be granted to consider the issue raised by the Board's gross delay because the Court of Appeals' decision creates a conflict between the circuits and involves an important federal question of law which has not been but should be decided by this court.***

1. *Conflict Between the Circuits*

In the instant case, the withdrawal of recognition from Local 1529 occurred in 1982, and the case was tried before an ALJ in 1983. The Board did not issue its decision until May of 1989, almost seven years after the occurrence of the underlying facts. No reason or explanation was offered for this gross delay. The Board now forces Petitioners to bargain with Local 1529. The problem with this bargaining order is that the bargaining unit employees have had no contact with this or any other union since 1982. Moreover, the vast majority of the present meat market employees were not even employed in 1982.[6] The Board's order, if enforced, clearly will have the effect of requiring an employer to bargain with a union where there is no reason to believe the union is supported by a majority of employees in the bargaining unit.

The Court of Appeals' enforcement of the bargaining order in this case places the Sixth Circuit Court of Appeals in conflict with other circuits. The Fifth and Seventh

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[6] This fact was presented to and accepted for consideration by the Court of Appeals

Circuits have held that a bargaining order cannot be enforced after gross Board-occasioned delay where there is little or no reason to suppose the union has majority support after so great a length of time.

In *Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398 (5th Cir. 1991), the employer withdrew recognition in July 1984 from a union based upon its belief that the employees no longer wanted union representation. An ALJ heard unfair labor practice charges brought by the union challenging the withdrawal in October 1984 and issued his decision in February 1985. Exceptions were timely filed but the Board did not issue its decision and order until September 1989. The Board's order required the employer to resume bargaining with the union. The Fifth Circuit reviewing the Board order, stated:

> Without explanation for the delay, the NLRB took over four years after the ALJ had made his initial determination to issue a final order. While administrative delay is common and unfortunately expected, it must be taken into account. If delays are occasioned by an obstinate employer, he may not benefit from his own wrongs, and a bargaining order will be enforced. At the same time, a four year delay by the Board is unreasonable, and cannot be ignored in developing a remedy that protects employee rights.

Id. at 404 (citations omitted). Thus, rather than enforce the bargaining order without any concern being given to whether the employees wanted to be represented by the union, the court ordered that the Board determine employee sentiment through a Board-sponsored election.

The Seventh Circuit Court of Appeals in *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984),

denied enforcement of a Board bargaining order which was issued after several years of administrative delay. The court, noting that in the interim there had been significant employee turnover, reasoned that the employees should not be deemed to be represented by the union where there was no reason to believe the union in fact was supported by a majority of the current workers in the bargaining unit. The Board had only itself to blame for the gross delay which made enforcement of its order unfair and inappropriate.

The Sixth Circuit Court of Appeals' enforcement of the Board's bargaining order in the instant case cannot be squared with these decisions from other circuits. Petitioners respectfully suggest that this Court should grant a writ in order to resolve the conflict which now exists between the circuit courts of appeals.

2. *Important Federal Question*

Petitioners additionally suggest that the issue of what a court of appeals should do where it is asked to review a Board bargaining order after gross Board delay is an important and frequently recurring issue of federal law which should be decided by this Court. While this Court has previously considered the issue of inordinate Board delay in cases involving backpay orders,[7] it has never addressed the issue in a case involving a bargaining order. The two situations are very much different. In a case involving a backpay order, if enforcement is not granted, then the employees will clearly lose. If the backpay order is enforced, then the employer clearly suffers on account of

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[7] *NLRB v. International Association of Bridge, Structural & Ornamental Iron workers, Local 480*, 466 U.S. 720 (1984) (per curium); *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 369 U.S. 258, 90 S. Ct. 417, 24 L.Ed.2d 405 (1969).

the Board's delay. Whichever route is taken, either the employees or the employer must inevitably pay a penalty as a result of the Board's delay.[8] The situation is different in a case involving a bargaining order because such a case does not place the parties in a no-win situation where one party inevitably must shoulder an unfair consequence because of the Board's own inordinate delay. Rather, there exists a simple alternative — requiring the Board to hold an election — which protects the legitimate rights of the employees, the union, and the employer.

If Board delay were a rare occurrence, then perhaps a less compelling argument could be made that the Court should consider this question. Unfortunately, however, the problem of Board delay has been and continues to be a common occurrence.

In 1984 the House Committee on Government Operations heard testimony concerning the increasingly apparent and disturbing problem of inordinate delay by the National Labor Relations Board in rendering decisions in cases before it. One commentator observed that, sadly, once a case is presented to the Board, "it appears to enter a new dimension — one where time has little meaning." House Committee on Government Operations, *Delay, Slowness in Decision Making, and the Case Backlog of the NLRB,* H.R. Rep. No. 1141, 98 Cong., 2nd Sess. 16 (1984). This commentator noted that the long delays that have come to be expected from the Board often force parties to wait years for a decision, a process that can be so frustrating that many have said they "would prefer to have the case decided immediately by the flip of a coin." *Id.* at 11.

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[8] This Court has held that in such a case the wrongdoing employer, not the employees, must shoulder the consequences of the Board's delay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, supra.

The problem has not been resolved subsequent to those comments in 1984. Indeed, a recent General Accounting Office study revealed that, in the six year period ending in 1989, ten percent of cases before the Board took over three years to decide and some cases took more than seven years to decide. *Selected Statements on Delays in NLRB Case Handling*, 193 Daily Labor Report (Bureau of National Affairs) D-1, 5 (October 3, 1990). Chairman Tom Lantos of the Employment and Housing Subcommittee noted that some people when talking about a case going to the Board have "spoken about it in the same tone as if the case had gone to the Bermuda Triangle." *Id.* at 1.

The reality of the situation described by these government studies and commentators is forcefully demonstrated by numerous cases in which Board orders have been appealed to the courts of appeals due to the unfairness of Board-occasioned delay. The case *sub judice* in which the Board took over five years to render a decision after the ALJ's decision is only one example. *See also, e.g., Texas Petrochemicals Corp. v. NLRB, supra* (4 year delay); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 59, 112 L.Ed.2d 34 (1990) (six year delay); *Continental Web Press, Inc. v. NLRB, supra* (more than two year delay); *Ollivetti Office USA, Inc. v. NLRB*, 926 F.2d 181 (2d Cir.), *cert. denied*, 112 S. Ct. 168, 116 L.Ed.2d 132 (1991) (two year delay). These cases are but a few of the reported cases involving inordinate Board-occasioned delay and the question of whether a Board order should be enforced in light of the lengthy delay.

Because the problem of gross Board delay has been and continues to be a recurrent problem, and because the question of representation goes to the very heart of national labor policy under the National Labor Relations Act,

Petitioners respectfully suggest that the issue is one which warrants review by this Court.

B. *A writ should be granted to consider the application of Section 10(b) of the National Labor Relations Act in this case because the Board's and the Court of Appeals' application of that statute conflicts with a decision of this Court.*

Section 10(b) of the National Labor Relations Act prohibits the Board's General Counsel from issuing an unfair labor practice complaint with respect to events occurring more than six months prior to the filing of a charge. Section 10(b) is a statute of limitations. Nothing more. In the present case, however, the Board and the Court of Appeals have utilized a novel application of Section 10(b) to bar Petitioners from considering events which occurred more than six months prior to their withdrawal of recognition. This novel use of Section 10(b) distorts *Local Lodge No. 1524, International Association of Machinists, AFL-CIO v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416, 80 S. Ct. 822, 4 L.Ed.2d 832 (1960).

In *Bryan Mfg. Co.* this Court recognized that Section 10(b) is a statute of limitations which does not bar use of evidence of earlier events "to shed light on the true character of matters within the six month limitations period," *Id.* at 416-17, but does preclude use of evidence outside the six month period to "cloak with illegality that which was otherwise lawful." *Id.* The Court's opinion did not in any manner embrace the Board's now bizarre use of Section 10(b) as a bar to an employer's withdrawal of recognition. The Board's new application of Section 10(b) ignores the plain text of the statute: this section is simply a statute of limitations regulating the General Counsel's prosecution of unfair labor practice matters.

In the case *sub judice,* Petitioners introduced evidence that the merger election between Locals 452 and 1529 was defective and invalid — not to "cloak with illegality" and support a charge concerning anything Local 1529 did subsequent to that merger — but merely to show that Petitioners had lawful grounds to cease recognizing Local 1529 until majority support was properly demonstrated. If Local 1529 did not represent the employees, then the Petitioners could rightly refuse to bargain with that union.

Because the novel use of Section 10(b) by the Board and by the Sixth Circuit Court of Appeals in this case conflicts with *Bryan Mfg. Co.* and disregards the plain text of the statute, a writ should be granted. Petitioners respectfully suggest that the issue of representation is not subject to the Section 10(b) *unfair labor practices* period. An employer should not be required to continue bargaining with a union when facts come to light which create a genuine question concerning representation which the Board must resolve by conducting a representation election.

C. ***A writ should be granted on the "ratification" issue because it involves an important question of federal law which has not been but should be decided by this Court.***

In *Montgomery Ward & Co.,* 115 NLRB 645, 647 (1956), *enf'd.,* 242 F.2d 497 (2d Cir.), *cert. denied,* 355 U.S. 829 (1957), the Board held that "when a supervisor is a member of the union, the company is responsible for his circulation of anti-union petitions only if it encouraged, authorized, or ratified — in other words affirmatively participated in — the supervisor's activities." The reason an employer cannot "participate in" the decertification process is to give effect to the policy of the NLRA that

employees have free choice in representation issues. *See, e.g., NLRB v. Link-Belt Co.*, 311 U.S. 584, 599, 61 S. Ct. 358, 85 L.Ed.2d 368 (1941). If an employer has affirmatively participated in or encouraged employee support for the petition, then the Board considers the petition "tainted" and ineffectual.

In the instant case, relying on *Montgomery Ward & Co.*, the Board ruled that the head meatcutters' own statements in support for decertification (which were not shown to have been authorized or encouraged by the employer) were later "ratified" by a management representative and that this "ratification" tainted the petition. This ruling is wholly irrational because the so-called "ratification" took place *after* the decertification petition had been lawfully circulated, signed by employees without employer influence, and filed with the Board. Such "ratification" could in no way have influenced the employees' exercise of free choice in signing the petition expressing their opposition to representation by Local 1529.

Petitioners respectfully suggest that the Board's "ratification" doctrine is irrational and raises an important question of federal law which has not but should be decided by this Court.

CONCLUSION

Wherefore, Petitioners pray that a writ of certiorari be granted and that the judgment of the Court of Appeals be reversed.

Respectfully submitted this 29th day of January, 1992.

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